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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re DONNELL JAMEISON,

on Habeas Corpus.

H036899
(Santa Clara County
Super. Ct. No. 71194)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING

BY THE COURT:

It is ordered that the opinion filed herein on October 25, 2012, be modified as follows:

On page 13, insert the following footnote at the end of the last full paragraph:

At oral argument, Jameison’s counsel conceded that Jameison’s recent serious disciplinary violation for possession of marijuana was sufficient to support the Board’s decision to deny parole. In a petition for rehearing, Jameison reasserts his contention the Board’s decision was nonetheless flawed because it failed to acknowledge or discuss certain circumstances tending to show that Jameison was suitable for parole, such as his age, his minimal juvenile record, his “reasonably stable” social history and the fact that the life crime occurred during a period of significant stress in Jameison’s life. Given counsel’s aforementioned concession, however, that contention is moot.

On page 14, delete the last sentence of the last paragraph, beginning with “In this case, the Board was justified ...” and replace that sentence with the following:

In this case, the Board expressed its uneasiness with Jameison’s statements that prison saved his life, i.e., that if Jameison had not killed Daugherty, Jameison’s

alcoholism or other problems would have caused his own death, and that he “no longer blamed” Daugherty. While the second statement indicates that Jameison has accepted responsibility for the life crime, the first statement suggests Jameison believes that Daugherty’s death saved Jameison’s own life. While perhaps true, it demonstrates a selfish and somewhat callous outlook on the life crime, which could be fairly interpreted by the Board as a rationalization of the life crime and revealing a lack of insight therein.

Respondent’s petition for rehearing is denied. There is no change in the judgment.

Dated: _____

Premo, J.

Rushing, P.J.

Elia, J.

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In 1978, Donnell Jameison shot and killed Thom Daugherty, a longtime friend with whom Jameison was living while Jameison was going through a divorce. Just before the shooting, Daugherty made a sexual advance toward Jameison and accused him of being a homosexual. Jameison claims he was prostituted out by his parents at a young age to one or more older men, and this history, combined with his being heavily intoxicated, prompted him to shoot Daugherty twice in the head with a bolt-action .22-caliber rifle. In 1979, Jameison pleaded guilty to one count of second degree murder and was sentenced to 15 years to life.

On November 19, 2009, the Board of Parole Hearings (Board) found Jameison unsuitable for parole. The Santa Clara County Superior Court subsequently granted Jameison's petition for a writ of habeas corpus and ordered the Board to conduct a new hearing for him within 100 days. The superior court found the Board failed to employ an objective framework in concluding that Jameison lacked sufficient insight into the commitment offense and also improperly assigned "weight" to the commitment offense in concluding that Jameison is unsuitable for parole.

Respondent Randy Grounds, warden of the Correctional Training Facility (Warden), appeals from the order. He argues that there is some evidence in the record to support the Board's conclusion that Jameison poses a current risk of danger to society.

We agree there was some evidence to support the Board's conclusion that Jameison was unsuitable for parole and shall reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The 2009 Board hearing

1. The life crime

The Board related the facts of the commitment offense as follows.

"December 21, 1978, 6:42 a.m., [Jameison] contacted Mountainview [sic] Police Department to report the shooting death of Thom . . . Daugherty . . . , age 62. Arriving officers found Daugherty lying on the right--on his right side on a bed with a blanket pulled neatly over his shoulder. A bullet wound was observed behind his left ear. There did not appear to have been a struggle prior to the shooting. Actually, Mr. Daugherty suffered two gunshot wounds. Mr. Jameison was interviewed, and he advised the officers he had known Daugherty for 14 years. He had been staying with him for about two months. Jameison was subsequently administered a residue test which revealed traces of gunpowder, and Mr. Jameison's estranged wife indicated he had stated to her that Daugherty had been shot twice in the head, and he was deceased."

Jameison gave this account of the crime.

"Previously [sic] to my shooting him, I had been staying with Thom. I was going through a divorce. And we were both drinking. I ended up going upstairs to go to bed. I feel [sic] asleep. I woke up at approximately three o'clock in the morning, and Thom had my pants down and was trying to enter me. I jumped up, pulled my pants up, and at some point in this I picked up the rifle, threatened Thom. He laughed at me and said, you're just as queer as I am, at which point I totally lost it. I shot him, and then what I tried to do is make it look like a robbery to cover it up, or burglary. I called the police. . . . They took a residue test, and I ended up pleading guilty."

Before the shooting, he and Daugherty had been drinking for a while, had smoked some marijuana and ingested psilocybin. When Jameison fired the first shot, Daugherty

was sitting up, facing him, but turned his head so the bullet entered behind his left ear. After the shooting, Jameison positioned Daugherty lying down in bed, and pulled the covers up. After further arranging the scene to make it appear a burglary had taken place, Jameison discarded the murder weapon in a ditch by a freeway onramp and called the police.

Jameison knew Daugherty was gay, but Daugherty had never made a sexual advance toward him before that evening. Because Daugherty knew Jameison had nowhere else to go, Jameison thought “he was just taking advantage of the situation.” According to Jameison, “I think [Daugherty] felt that, you know, I owed it to him because I was staying there. I was basically living off of him.”

When asked what one thing might have prevented the crime, Jameison said, “Alcohol.” If he had not been drinking that evening, he would not have shot Daugherty.

When asked what he thought of Daugherty, Jameison told the Board, “He was a friend. He was somebody who probably would have come [*sic*] to visit me if I had been in prison. I don’t blame him for what he did anymore. I’m not sure what his problems were. I regret the whole situation.” After Jameison said he would have to “live with” it for the rest of his life, the Board responded, “Well, [Daugherty] doesn’t have his life anymore.”

2. *Social history*

Jameison was born March 6, 1948, in Asheville, North Carolina. He is an only child, though he had a half-sister who is now deceased. His parents, both of whom are deceased, divorced shortly after his birth. Jameison has a stepfather who lives in Washington.

Jameison told the Board that, when he was 12 years old, his parents prostituted him and his half-sister out for money and goods. A man paid for Jameison’s family to move from North Carolina to California in exchange for Jameison sleeping in the man’s bedroom. Jameison recalls a conversation between that man and Jameison’s mother in

which the man said that Jameison was gay and he should be allowed to take Jameison and “show him the proper way.” When he was 13 or so, Jameison discovered that he could avoid being prostituted if he shoplifted items to his parents to pawn, so he started stealing.

He attended high school in Half Moon Bay, but dropped out after 10th grade. He obtained a GED in 1965 and attended Palo Alto Business College in 1978.

Jameison served in the United States Army from 1968 to 1970 and was honorably discharged. However, prior to his discharge, he received an “Article 1 for drinking” and was sentenced to two weeks of extra duty.

Jameison was married twice, and has a total of three children. Jameison blamed his alcoholism for the failure of his marriages.

He began drinking about the age of 13, when his stepfather and mother would give him hard cider to drink.

3. Prior criminal record

When he was 16 years old, Jameison was arrested for forgery, declared a ward of the court and released to his parents’ custody.

As an adult, Jameison was convicted for theft in 1970, forgery and receipt of stolen property in 1971, theft of government property in 1972, shoplifting in 1974 and misdemeanor drunk driving in 1978. The longest sentence he received for these offenses was a five-year federal prison term for the 1972 theft of government property.

At the time of his arrest for Daugherty’s murder, Jameison had several pending criminal cases, including charges for snatching a woman’s purse and arson. When asked about the arson charges, Jameison stated he had no memory of committing arson and believed that his ex-wife falsely accused him of those crimes because she was angry at him. The district attorney agreed to dismiss the arson charges based on his pleading guilty to the second degree murder of Daugherty.

4. *Parole plans*

If paroled, Jameison was approved to participate in the Veterans' Affairs (VA) transition housing program in Menlo Park for up to two years, after which he would remain eligible for housing and other services through the VA. Jameison also had numerous supportive letters from members of his extended family, such as uncles, aunts and cousins, who offered to provide housing and funds to Jameison should he need them.

5. *Institutional record*

At the time of his parole hearing, Jameison's classification score was 19 and he was housed in the general population.

Since his incarceration, Jameison had received five CDC-128 write-ups and six CDC-115 write-ups. His most recent CDC-115 was in July 2007 for possession of a controlled substance (marijuana)¹ and "non issued property." When asked about the 2007 marijuana incident, Jameison told the Board he had to "decide whether to try to make up a story to tell you on that or to tell you the truth, because it sounds like a story." He explained that he was working in Ad Seg and there was a pair of shoes that were going to be thrown away. Jameison asked the officer if he could have the shoes and the officer agreed. Jameison wore the shoes for over six months, but never pulled up the inner sole. However, during a search, an officer did so and discovered a bindle of marijuana inside the shoe. Jameison denied knowing it was there, denied using marijuana, and his drug test for marijuana was negative. Jameison believes the marijuana belonged to the unknown inmate from whom the shoes had originally been confiscated. He admitted using marijuana in 2002 when he previously received a CDC-115 for possession, but denied using it in 2007.

Jameison participated in the Correctional Learning Network, completing classes in January, March 2008 and June 2008. At the time of the hearing, he was involved in the

¹ Jameison also received a CDC-115 in 2002 for possession of marijuana.

Partnership for Reentry Program, and was in a book club, preparing two reports a week. He completed a program entitled Cage Your Rage in 2009, and attended a 12-week anger management class in 2007.

Jameison began attending AA in 1998. His attendance was sporadic at first, but has since become regular. At the time of the hearing, Jameison was working on steps 8 and 9.

In addition to anger management therapy, Jameison is involved in group therapy and has “learned some coping strategies for stress.” When he starts having problems, he will ask to see his psychologist, get a friend to go out in the yard to talk and exercise, so he can “acknowledge what I have to lose, what I’ve already lost.” Jameison believes he would probably be dead if he had not gone to prison, and that it was “a shame that--at 61 years old I’ve wasted practically my whole life.”

With respect to vocations, Jameison had undertaken no vocational training while incarcerated, but indicated he was an inactive member of two unions: the International Brotherhood of Electrical Workers and the Culinary Union. He would activate those memberships again upon release. He has been “work[ing] with computers” for 12 years, and worked in silk-screening and airbrushing. Jameison had sent some of his work to graphic arts companies some years ago and those companies were impressed and “offered [him] opportunities.”

6. 2008 psychological evaluation

Jameison accepted responsibility for the life crime, but indicated the childhood abuse and molestation he experienced were contributing factors. He also noted “he was vulnerable . . . because of the on-going divorce, separation, work issues, and a lot of other stressors at the time. [Jameison] stated that he felt betrayed by the victim. . . . ‘When he called me a queer, it was too much, and it brought back all those memories.’ ” Jameison also believes that his drinking was a major factor in the life crime, and that once he

stopped using alcohol, he began “doing positive things” and “improved his self-confidence and belief in himself.”

The evaluation indicated that Jameison scored in the low range for psychopathy, in the moderate to low risk category for violent recidivism, and in the medium range for general recidivism. According to the evaluation, Jameison’s prison disciplinary history “suggests some lingering impulsivity.”

In the section entitled “summary/conclusions,” the evaluator wrote “The variables that decrease [Jameison’s] violence potential . . . are: The inmate accepts responsibility for the crime as stated in the record and can identify the key characteristics and how he has remediated them. He has had a good response to treatment. He does not have a negative attitude and has no active mental health symptoms. The recency [*sic*] of the inmate’s discipline history suggests continued impulsivity. This individual does not present as an imminently serious risk management problem in the community. His parole plans seem feasible and appropriate. He has handled destabilizers, stress, and compliance well.”

7. *Denial of parole*

The Board denied parole to Jameison for three years, finding that he posed an unreasonable risk of danger if released from prison. The Board stated its decision is “based on weighing the considerations provided in California Code of Regulations Title 15.” The Board cited the following factors in support of its denial: the commitment offense, in which the victim was shot twice with a bolt-action rifle; Jameison’s prior escalating criminal history and failure to profit from prior efforts to correct his criminality; his unstable social history, including his long-term history of alcohol abuse and his childhood history of being prostituted by his parents; his lack of insight into the crime, as evidenced by his statement that he does not “blame [the victim] for what he did”; his recent disciplinary record, particularly the CDC-115s for possession of marijuana and the possession of property which resulted in his losing his position as a

clerk; and his 2008 psychological report which rated him as presenting a moderate to low risk of violent recidivism.

The panel commended Jameison for his parole plans, and noted he had an “extensive and positive work history . . . in electrical[,] culinary and computers.” The Board also indicated that Jameison had many letters from aunts, uncles and cousins offering financial and emotional support, and had numerous laudatory chronos from correctional officers. Jameison had also participated in a great deal of institutional programming and therapy.

The Board recommended Jameison remain discipline free, upgrade his education when possible, and continue participating in available self-help and therapy.

B. Petition for writ of habeas corpus

On August 19, 2010, Jameison filed a petition for writ of habeas corpus, alleging that the Board’s decision to deny him parole violates the terms of his plea bargain. He also claimed the Board failed to articulate a nexus between the commitment offense and his current risk to public safety, nor was there some evidence to support the decision to deny parole. In addition, Jameison raised the 2008 amendments that Marsy’s Law made to Penal Code section 3041.5,² claiming the Board’s reliance on these amendments violated his plea bargain which contemplated that his parole hearings would use the procedures in place at the time of his sentencing in 1979.

The superior court issued an order to show cause and, on March 25, 2011, granted the petition, faulting the Board for failing to apply an “objective framework” in concluding that Jameison lacked insight into the commitment offense and for assigning “weight” to the commitment offense in its analysis of whether or not Jameison presented

² The Marsy’s Law amendments to Penal Code section 3041.5 went into effect on November 5, 2008, after voters approved Proposition 9, otherwise known as the “Victims’ Bill of Rights Act of 2008: Marsy’s Law.” (Pen. Code, § 3041.5; Cal. Const., art. I, § 28.)

a current risk of dangerousness to public safety. With respect to the “lack of insight” finding, the superior court quoted this portion of the Board’s decision: “ ‘Our concern is that we’re not sure that you truly understand the nature and the magnitude of the offense. . . . We’re not sure that you really have absorbed the magnitude of what happened.’ ” The superior court criticized these statements as the “sort of vague, amorphous, and subjective ‘lack of insight,’ which one always remains vulnerable to.”

Warden appealed and subsequently petitioned for a writ of supersedeas staying the superior court’s order. We granted the petition.

II. DISCUSSION³

A. Standard of review

“[T]he judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision’s consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner’s petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 (*Rosenkrantz*).)

³ Warden argues the petition is moot because Jameison had a parole hearing in March 2010, in which he was also found unsuitable for parole, and thus his due process rights were met. We disagree. Jameison is entitled to due process in each and every parole hearing. The mere fact that a subsequent parole hearing has been held would not necessarily mean that the deficiencies, if any there were, from a previous hearing were cured. The case before us involves Jameison’s claim that his due process rights were violated at the 2009 hearing, and Warden has presented no evidence to show that the 2010 hearing was held to correct those claimed violations, let alone that the 2010 hearing comported with due process itself.

Under the “some evidence” standard, only a modicum of evidence is required to uphold a decision regarding suitability for parole. (*In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*); *Rosenkrantz, supra*, 29 Cal.4th at p. 677.) It is not for the reviewing court to decide which evidence in the record is convincing. (*Shaputis II, supra*, at p. 211.) Thus, the court may not independently resolve conflicts in the evidence, determine the weight to be given the evidence, or decide the manner in which the specified factors relevant to parole suitability are to be considered and balanced because those are matters exclusively within the discretion of the Board. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260 (*Shaputis I*); *Rosenkrantz, supra*, at p. 677; *In re Scott* (2004) 119 Cal.App.4th 871, 899.) Indeed, “[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole.” (*Rosenkrantz, supra*, at p. 677.)

While the standard of review is deferential, it is not “ ‘toothless’ ” and “ ‘must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights’ [citation], it must not operate so as to ‘impermissibly shift the ultimate discretionary decision of parole suitability from the executive branch to the judicial branch’ [citation].” (*Shaputis II, supra*, 53 Cal.4th at p. 215.)

Where the superior court grants habeas relief without an evidentiary hearing, we review the matter de novo. (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

B. Parole suitability and unsuitability criteria

The general standard for a parole unsuitability decision is that “a life prisoner shall be found unsuitable for and denied parole if in the judgment of the [Board or the Governor] the prisoner will pose an unreasonable risk of danger to society if released from prison.” (Cal. Code of Regs., tit. 15, § 2402, subd. (a).)⁴ A nonexclusive list

⁴ Unspecified section references are to title 15 of the California Code of Regulations.

of factors which demonstrate an inmate's unsuitability for parole includes: the offense was committed in an especially heinous, atrocious, or cruel manner; the inmate possesses a previous record of violence; the inmate has an unstable social history; the inmate has a lengthy history of severe mental problems related to the offense; and the inmate has engaged in serious misconduct while in prison. (§ 2402, subd. (c).)

Relevant factors, also nonexclusive, tending to demonstrate suitability for parole include the inmate's lack of a prior record of violent crime; the inmate's stable social history; the inmate's expressions of remorse; the inmate is of an age that reduces the probability of recidivism; the inmate has made realistic plans for release or has developed marketable skills that can be put to use upon release; and the inmate has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)

The factors serve as generalized guidelines and “ ‘the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board].’ ” (*Rosenkrantz, supra*, 29 Cal.4th at p. 654.) Parole release decisions are essentially discretionary; they “entail the Board's attempt to predict by subjective analysis” the inmate's suitability for release on parole. (*Id.* at p. 655.) Such a prediction requires analysis of individualized factors on a case-by-case basis and the Board's discretion in that regard is “ ‘ “almost unlimited.” ’ ” (*Ibid.*) However, as the California Supreme Court later clarified, “It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212 (*Lawrence*).) Accordingly, in exercising its discretion, the Board “must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation.” (*Id.* at p. 1219.) That “requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the

necessary basis for the ultimate decision--the determination of current dangerousness.” (*Id.* at p. 1210.)

C. There was sufficient evidence to show Jameison’s current dangerousness

The “nexus” analysis described in *Lawrence* is straightforward. The Board must discuss the factors that demonstrate why a particular inmate is or is not suitable for parole and connect those factors to its ultimate conclusion that the inmate would present a danger to public safety if released. “It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.” (*Lawrence, supra*, 44 Cal.4th at p. 1212.)

As discussed above, the Board cited a number of factors supporting its decision finding Jameison unsuitable for parole, including the commitment offense, his criminal history and failure to profit from prior efforts to correct his criminality; his unstable social history, including his long-term history of alcohol abuse and his childhood history of being prostituted by his parents; his lack of insight into the crime, as evidenced by his statement that he does not “blame [the victim] for what he did”; his recent disciplinary record, particularly the CDC-115s for possession of marijuana and the possession of property which resulted in his losing his position as a clerk; and his 2008 psychological report which rated him as presenting a moderate to low risk of violent recidivism.

The commitment offense and Jameison’s prior criminal history are immutable factors. While the Board is authorized to rely on these as factors demonstrating unsuitability for parole (§ 2402, subd. (c)(2), (c)(3)), it must, under *Lawrence*, tie those unchanging factors to more recent events or circumstances in order to establish their continued relevance. The Board did so here.

Here, Jameison’s criminal and social background before the murder reflects his lengthy history of substance abuse, poor judgment and impulsivity. At the hearing, Jameison admitted that he likely would not have killed Daugherty had he not been

drinking. Given that background, the Board was justifiably concerned about Jameison's recent rules violations, particularly the CDC-115 he received in 2007 for possession of marijuana. That violation, coupled with Jameison's substance abuse history and his statement to the Board that the commitment offense would likely not have occurred if he had not been drinking, is indicative of both his inability to comply with prison rules and his tendency to relapse into substance abuse.

The California Supreme Court explained that evidence of an inmate's recent institutional conduct, mental state, or parole plans may not support a determination of current dangerousness standing alone, but it may do so when considered together with other evidence. (*In re Prather* (2010) 50 Cal.4th 238.) "For example, if the record disclosed a recent disciplinary violation for reporting late to work, that information might not, standing alone, constitute some evidence that [the inmate] remains dangerous, but it may possess substantially more probative value if the record demonstrates that [the inmate's] criminality was tied to an inability to retain employment because of his chronic tardiness." (*Id.* at p. 256.)

In this case, the Board believed the 2007 rules violation for possession of marijuana was yet another manifestation of Jameison's poor judgment and lack of impulse control. Given how long he had been incarcerated, the Board considered the relatively recent serious discipline to be probative of his current dangerousness because it tended to show that he still had difficulty keeping his behavior within boundaries and controlling his impulses, especially related to substance abuse. The Board could reasonably find that it demonstrated the same qualities reflected in the circumstances of Jameison's offense, his prior criminal and social background and instability. For this reason, the Board could further find that those immutable circumstances from Jameison's past continued to be probative of current dangerousness. Accordingly, we conclude that Jameison's recent citation for possession of marijuana constitutes "some evidence" supporting the Board's ultimate conclusion that Jameison was currently dangerous.

The Board also inferred from Jameison's statements at the hearing an effort to shift some of the blame to Daugherty and thereby minimize his own culpability and lessen his responsibility. In its decision, the Board states, as follows: "[W]hen I did ask you about Mr. Daugherty you were talking about prison saving your life, you coming to prison and you may have been dead. [*Sic.*] And I asked you about Mr. Daugherty, and at that point you did say, 'I don't blame him for what he did,' and I did note that and highlighted it in my notes as well. So, I think that when we're rationalizing or excusing our behavior, and not acknowledging that your actions led to the demise of someone else who didn't have the opportunity to come to prison and live, that's a concern of the Panel."

"The regulations do not use the term 'insight,' but they direct the Board to consider the inmate's 'past and present attitude toward the crime' (Regs., § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of 'insight.' " (*Shaputis II*, *supra*, 53 Cal.4th at p. 218.) "In *Lawrence*, we observed that 'changes in a prisoner's maturity, understanding, and mental state' are 'highly probative . . . of current dangerousness.' [Citation.] In *Shaputis I*, we held that [the] petitioner's failure to 'gain insight or understanding into either his violent conduct or his commission of the commitment offense' supported a denial of parole. [Citation.] Thus, we have expressly recognized that the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Ibid.*) Accordingly, the Board is entitled to look beyond an inmate's expressions of remorse and willingness to be accountable and examine the inmate's current mental state and attitude about the commitment offense to determine whether there is a truthful appreciation for the wrongfulness of the act. (*Ibid.*) In this case, the Board was justified in its concern that

Jameison’s statement that he “no longer blamed” the victim for making a sexual advance towards him demonstrated that Jameison harbored a belief that Daugherty was in some way responsible for his own death.

The 2009 psychological evaluation also concluded that Jameison presented a moderate to low risk for violent recidivism, and a medium range risk for general recidivism. The evaluation also indicated that Jameison’s prison disciplinary history “suggests some lingering impulsivity.” This unfavorable report further supports the Board’s conclusion that Jameison is unsuitable for parole.

Based on this record, there is sufficient evidence to support the Board’s conclusion that Jameison is presently dangerous and unsuitable for parole at this time.

D. Ex post facto challenge to Marsy’s Law

Jameison contends the 2008 amendments that Marsy’s Law made to Penal Code section 3041.5 violate the ex post facto clauses of the federal and California Constitutions.⁵ He argues that the amendments deprive him of the “individual consideration to which he was entitled under the law that applied at the time of his offense.” We disagree.

Both the federal and state Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) This prohibition is based on the principle that “persons have a right to fair warning of that conduct which will give rise to criminal penalties” (*Marks v. United States* (1977) 430 U.S. 188, 191.) Thus, laws that “retroactively alter the definition of crimes or increase the punishment for criminal acts” are unconstitutional. (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; *People v. Alford* (2007) 42 Cal.4th 749 (*Alford*).)

⁵ The California Supreme Court is currently considering this issue. (*In re Vicks* (2011) 195 Cal.App.4th 475, review granted July 20, 2011, S194129; *In re Russo* (2011) 194 Cal.App.4th 144, review granted July 20, 2011, S193197.)

However, “[a] change in the law that merely operates to the disadvantage of the defendant or constitutes a burden is not necessarily ex post facto.” (*People v. Bailey* (2002) 101 Cal.App.4th 238, 243.) California’s ex post facto law is analyzed in the same manner as the federal prohibition. (*Alford, supra*, 42 Cal.4th at p. 755.)

Pre-Marsy’s Law versions of Penal Code section 3041.5 provided for annual parole suitability hearings for inmates who had been denied parole, but gave the Board discretion to defer subsequent hearings for two years (and up to five years for life term inmates convicted of more than one murder) if it was not reasonable to expect parole would be granted before that. (See *In re Brown* (2002) 97 Cal.App.4th 156, 158 [relating the history of Pen. Code, § 3041.5].) The 2008 amendments gave the Board discretion to schedule subsequent suitability hearings 15, 10, seven, five, or three years after a parole denial. (Pen. Code, § 3041.5, subd. (b)(3).)⁶ This means that instead of issuing one- to five-year denials, as in the past, the Board now issues denials ranging from a minimum of three years to a maximum of 15 years.

⁶ Penal Code section 3041.5, subdivision (b)(3) provides:

“The board shall schedule the next hearing, after considering the views and interests of the victim, as follows:

“(A) Fifteen years after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the setting of parole release dates . . . are such that consideration of the public and victim’s safety does not require a more lengthy period of incarceration for the prisoner than 10 additional years.

“(B) Ten years after any hearing at which parole is denied, unless the board finds by clear and convincing evidence that the criteria relevant to the setting of parole release dates . . . are such that consideration of the public and victim’s safety does not require a more lengthy period of incarceration for the prisoner than seven additional years.

“(C) Three years, five years, or seven years after any hearing at which parole is denied, because the criteria relevant to the setting of parole release dates . . . are such that consideration of the public and victim’s safety requires a more lengthy period of incarceration for the prisoner, but does not require a more lengthy period of incarceration for the prisoner than seven additional years.”

The United States and California Supreme Courts have previously held that statutes amending procedures to decrease the frequency of parole suitability hearings do not violate the ex post facto clause. (*California Dept. of Corrections v. Morales* (1995) 514 U.S. 499 (*Morales*); *In re Jackson* (1985) 39 Cal.3d 464 (*Jackson*).) In *Morales*, the United States Supreme Court rejected an ex post facto challenge to the constitutionality of a 1981 amendment to Penal Code section 3041.5. (*Morales, supra*, at p. 514.) The 1981 amendment authorized the Board to defer parole suitability hearings for up to three years for prisoners convicted of more than one murder. (*Ibid.*) The court reasoned that there was no ex post facto violation because the amendment did not increase the statutory punishment for the defendant's crime of second degree murder, which was 15 years to life both before and after the amendment. (*Id.* at p. 507.) The defendant's indeterminate sentence and the substantive formula for securing any reductions to that sentence were the same both before and after the 1981 amendment. The amendment did not affect the setting of his minimum eligible parole date, nor did it change the standards for determining his suitability for parole. (*Ibid.*) Rather, it simply " 'alter[ed] the method to be followed' in fixing a parole release date under identical substantive standards." (*Id.* at p. 508.)

In *Jackson*, the California Supreme Court rejected an ex post facto challenge to the constitutionality of a 1982 amendment to Penal Code section 3041.5 which authorized the Board to schedule biennial, rather than annual, parole suitability hearings. (*Jackson, supra*, 39 Cal.3d at p. 472.) The court held that the amendment effected only "a procedural change outside the purview of the ex post facto clause." (*Ibid.*) The amendment "did not alter the criteria by which parole suitability [was] determined . . . [n]or did it change the criteria governing an inmate's release on parole." (*Id.* at p. 473.) "Most important," the court emphasized, "the amendment did not entirely deprive an inmate of the right to a parole suitability hearing." (*Ibid.*) It simply "changed only the

frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability.” (*Ibid.*)

We see no reason why *Jackson* and *Morales* do not apply here. The 2008 amendments to Penal Code section 3041.5, like the amendment at issue in *Morales*, did not increase the statutory punishment for Jameison’s crime. (*Morales, supra*, 514 U.S. at p. 507.) His indeterminate sentence and the substantive formula for securing credits were not changed by the amendments, nor did they affect his minimum eligible parole date, change the standards for determining his suitability for parole, or “entirely deprive [him] of the right to a parole suitability hearing.” (*Jackson, supra*, 39 Cal.3d at p. 473; *Morales, supra*, at p. 507.) Instead, Marsy’s Law simply “ ‘alter[ed] the method to be followed’ in fixing a parole release date under identical substantive standards.” (*Morales, supra*, at p. 508.) Such procedural changes are outside the purview of the ex post facto clause. (*Jackson, supra*, at p. 472.) Accordingly, we reject Jameison’s ex post facto claim.

Jameison cites *Garner v. Jones* (2000) 529 U.S. 244 as supporting his position that Marsy’s Law is unconstitutional. A careful reading of that decision, however, leads to the opposite conclusion. In *Garner*, the United States Supreme Court held that application of an administrative regulation increasing the parole denial period from three years to eight years (a five-year increase--two years longer than the increase Jameison complains of here) did not violate the ex post facto clause of the federal Constitution where the regulation at issue vested the parole board with discretion and also permitted expedited reviews in the event of a change in circumstances “ ‘or where the [b]oard receive[d] new information that would warrant a sooner review.’ ” (*Id.* at p. 254.) The Marsy’s Law amendments to Penal Code section 3041.5 include similar qualifications. (Pen. Code, § 3041.5, subs. (b)(4) & (d)(3).)

Jameison argues that Penal Code section 3041.5, subdivision (d)(3) is distinguishable from the Georgia statute under review in *Garner* because it prohibits

prisoners from petitioning for an advanced hearing until three years after any denial, thus “mandat[ing] at least a three-year denial regardless of the length of time the Board considers the prisoner might require before a parole grant could reasonably be set for him.” We do not read Penal Code section 3041.5, subdivision (d)(3) so expansively.

We think Penal Code section 3041.5, subdivision (d)(3) means exactly what it says. There are three possible outcomes when an inmate requests an advanced hearing. One is positive--granting of the request and a decision, after the advanced hearing, to set a parole date. The other two are negative--“either a summary denial of” the request for an advanced hearing or granting of the request and “the decision of the [B]oard after a[n advanced] hearing . . . to not set a parole date.” (Pen. Code, § 3041.5, subd. (d)(3).) An inmate who obtains “either” of the two negative outcomes “shall not be entitled to submit another request . . . until a three-year period of time has elapsed from the summary denial or decision of the [B]oard.” (*Ibid.*) Penal Code section 3041.5, subdivision (d) does not impose a three-year blackout period when an inmate is denied parole after a regularly scheduled suitability hearing, but only when he or she is denied parole after a hearing advanced at his or her written request.

Furthermore, we reject Jameison’s argument that “Marsy’s Law . . . applies indiscriminately to all parole hearings and denies individual consideration of [his] suitability.” This argument ignores Penal Code section 3041.5, subdivision (b)(4), which gives the Board discretion, *sua sponte*, to “advance a hearing . . . to an earlier date, when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim’s safety does not require the additional period of incarceration of the prisoner provided in paragraph (3).” This procedural safeguard is similar to those the California Supreme Court held “provide[d] an inmate with a meaningful opportunity to argue for a finding of suitability . . . ,” reducing the likelihood that a longer postponement would affect his or her right to an early parole release, since it

was “conceivable that the Board could advance the suitability hearing and order immediate release.” (*Jackson, supra*, 39 Cal.3d at pp. 473, 474.)

III. DISPOSITION

The March 25, 2011 order granting Jameison’s petition for a writ of habeas corpus is reversed. The matter is remanded to the superior court with directions to vacate that order and enter a new order denying Jameison’s petition for a writ of habeas corpus.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.